1926

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 166.

BROWNE, MANZANARES & COMPANY, PLAINTIFFS IN ERROR,

vs.

FRANCISCO CHAVES, SECOND.

FILED DECEMBER 11, 1899.

No. 247.

BROWNE & MANZANARES COMPANY, APPELLANTS,

vs.

FRANCISCO CHAVES, SECOND.

FILED APRIL 19, 1900.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

(17,585 & 17,711.)

(17,583 & 17,711.)

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FILED APRIL 10, 1900.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court, before you, wherein Browne, Manzanares & Co. were plaintiffs in error and Francisco Chavez, 2nd, was defendant in error, a manifest error hath happened, to the great damage of said Brown, Manzanares & Co., as by their complaint appears, we, being willing that error, if any hath been, should *ne* duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of September, in the year of our Lord one thousand eight hundred and ninety-nine.

Seal Supreme Court, Territory of New Mexico.

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

2 TERRITORY OF NEW MEXICO, } *ss:*
County of Santa Fé, }

Supreme Court.

I, the undersigned, clerk of the supreme court of the Territory of New Mexico, do hereby make return to the within writ of error by transmitting to the Supreme Court of the United States a true copy of the record and proceedings in this cause therein mentioned under my hand and the seal of the supreme court of the Territory of New Mexico.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

Be it remembered that heretofore, on, to wit, the 16th day of May, A. D. 1897, there was filed in the office of the clerk of the supreme court a transcript of record; which said transcript of record is in words and figures as follows, to wit:

3 In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1897.

BROWNE, MANZANARES & CO., Plaintiffs in Error,
vs.
FRANCISCO CHAVES, 2D, Defendant in Error. } No. 718.

Transcript of Record.

Childers & Dobson, attorneys for plaintiffs in error.
B. S. Rodey, attorney for defendant in error.

4 The Territory of New Mexico to the district court of the second judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo, Greeting:

Because in the record and proceedings, and in the rendition of the judgment in a certain cause lately pending before you, wherein L. P. Browne and F. A. Manzanares, partners under the firm name and style of Brown and Manzanares were plaintiffs and Francisco Chavez, 2nd, was defendant, error has intervened, as it is said, to the damage of the said plaintiffs, and we being willing that such error, if any there be, should be corrected, and speedy justice done in that behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send a copy of the record and proceedings aforesaid, to the supreme court of the Territory of New Mexico, together with this writ, so that you have the same in the said supreme court on the first day of the next term thereof, to be begun and held on the last Monday of July, A. D. 1897, at Santa Fé, in said Territory, in pursuance of law.

Witness the Honorable Thomas Smith, chief
[COURT SEAL.] justice of the supreme court of the Territory of New Mexico, and the seal of said court, this 6th day of April, A. D. 1897.

GEO. L. WYLLYS, *Clerk.*

5 I, O. N. Marron, clerk of the district court of the second judicial district of the Territory of New Mexico, do hereby certify that the foregoing writ of error from the supreme court of the Territory of New Mexico to the said district court of the second judicial district of said Territory, sitting within and for the county of Bernalillo, in the case wherein L. P. Browne and F. A. Manzanares, partners under the firm name and style of Browne & Manzanares, are plaintiffs in error and Francisco Chavez, 2nd, is defendant in error, was caused to be lodged in my office by the said plaintiffs in error, on the 14th day of May, A. D. 1897; and I further certify that in accordance with the command of said writ, I herewith send a copy of the record, judgment and other proceedings had in said cause in the said district court, as the same appear of record in my office, to the supreme court of the Territory of New Mexico, together with this writ.

[COURT SEAL.] Witness, my hand and the seal of said district court of the second judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo, on this the 14th day of May, A. D. 1897.

O. N. MARRON, *Clerk.*

Be it remembered, that heretofore, to wit, on the 30th day of September, A. D. 1895, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, a præcipe for
6 *scire facias*, which said præcipe is in the words and figures following, to wit:

In the District Court, Second Judicial District, Territory of New Mexico, for the County of Bernalillo.

L. P. BROWNE and F. A. MANZANARES, Partners under the Firm Name and Style of Browne & Manzanares,
vs.
FRANCISCO CHAVEZ, SECOND.

The clerk of said court will issue *scire facias* against the said Francisco Chavez, Second, to revive the judgment rendered in this behalf against him in the said court in the October term, 1885, and returnable to the next October term of the said court.

September 30th, 1895.

E. W. DOBSON,
Attorney for Plaintiffs.

To O. N. Marron, clerk of the district court, second judicial district, Territory of New Mexico, county of Bernalillo.

And thereafter, and on the 30th day of September, A. D. 1895, there was issued out of the office of the said clerk in said cause a writ of *scire facias*, which said writ is in the words and figures following, that is to say:

The Territory of New Mexico to the sheriff of the county of Bernalillo, Greeting:

Whereas L. P. Browne and F. A. Manzanares, heretofore, in our district court of the second judicial district of the Territory of New Mexico, for the county of Bernalillo, in the October term thereof in the year 1885, to wit, on the 7th day of October, A. D. 1885,
7 by the consideration and judgment of the same court, recovered against Francisco Chavez, Second, in a certain action of assumpsit, the sum of four thousand one hundred seventy dollars damages, and also the costs of said L. P. Browne and F. A. Manzanares in that behalf taxed at the sum of eight and $\frac{20}{100}$ dollars, whereof the said Francisco Chavez, Second, was convicted, as appears to us of record; and now on behalf of the said plaintiffs, Browne and Manzanares, we have been informed that although judgment be given as aforesaid, yet execution of the damages and costs aforesaid

still remains to be made to him; wherefore the said Browne & Manzanares, as aforesaid, have besought us to provide them a proper remedy in this behalf. We do therefore command you that you make known to said Francisco Chavez, Second, that he be before our said district court at the court-house in Albuquerque in the county aforesaid on the first Monday of October next, to show cause if any he have why said Browne & Manzanares ought not to have execution against him, the said Francisco Chavez, Second, of the damages and costs aforesaid, according to the form and effect of said recovery, and have you there then this writ.

Witness the Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and [COURT SEAL.] judge of the said district court, and the seal thereof, at Albuquerque, aforesaid, this the 30th day of September, A. D. 1895.

O. N. MARRON, *Clerk.*

8 And thereafter and on, to wit, the 5th day of October, 1895, there was returned into the office of the said clerk, in said cause, the original writ of *scire facias*, with the sheriff's return attached, which said return is in the words and figures following, to wit:

I, sheriff of Bernalillo county, New Mexico, certify that I have served this summons on the within-named Francisco Chavez, 2nd, on the 30th day of September, 1895, at said county, by then and there delivering a copy of the same to Mrs. Francisco Chavez, 2nd, a free person residing at the usual place of abode of said Francisco Chavez, 2nd, over fifteen years of age, the said Francisco Chavez, 2nd, being then absent.

T. S. HUBBELL,
Sheriff of Bernalillo County.
By ——,
Deputy Sheriff.

Fees.

Service	$1.00
Mileage, 20 miles	2.50
Return	.50
	$4.00

And thereafter and on, to wit, the 7th day of October, A. D. 1895, there was filed in the office of the said clerk, in said cause, an appearance, which said appearance is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

L. A. BROWNE ET AL. }
vs. } No. 4349. Appearance.
FCO. CHAVEZ, 2ND. }

9 Comes now the above-named defendant by his attorney, B. S. Rodey, and enters appearance herein, and calls upon the plaintiffs for a copy of the declaration, etc.

B. S. RODEY,
Attorney for D'f't.

And thereafter, on, to wit, the 17th day of October, A. D. 1895, there was filed in the office of the clerk of the said court in said cause defendant's pleas, which said pleas are in the words and figures following—that is to say:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

BROWNE & MANZANARES }
vs. } Writ of *Scire Facias.* Defendant's Pleas.
FRANCISCO CHAVEZ, 2ND. }

Comes now the above-named defendant by his attorney, B. S. Rodey, and defends the wrong and injury, when, etc., and says that the said writ ought not to issue in the premises, because, he says, and here suggests to the court, that since the rendition of the said alleged judgment in said citation mentioned the said L. P. Browne departed this life on, to wit, the — day of ——, A. D. 189–, and this the defendant is ready to verify.

Wherefore he prays judgment if the said writ ought to issue or the said cause be revived.

BERNARD S. RODEY,
Att'y for Defendant.

And for a further plea in this behalf, the said defendant by his said attorney says that the said writ ought not to issue or the said action be revived, because he says that the said alleged judgment in the said petition and citation mentioned was not obtained or
10 rendered in said court and did not accrue to said plaintiffs within seven years next before the issuing of the said citation, but on the contrary the said judgment was as appears by the face of said citation obtained in this court on the 7th day of October, A. D. 1895, or nearly ten years before the issuing of said citation, and therefore under the provisions of No. 2 of chapter LIII of the Session Laws of New Mexico of the year 1891 the said judgment was without force on the 30th day of September, A. D. 1895, when the citation herein was issued out of this court; and this the defendant is

ready to verify; wherefore the said defendant prays judgment that the said citation be quashed, and the said cause be not revived.

BERNARD S. RODEY,
Attorney for Defendant.

Received a true copy of above pleas this Oct. 10, '95.

CHILDERS & DOBSON,
By WILMOT BOOTH.

And thereafter, on, to wit, the 1st day of November, A. D. 1895, there was filed in the office of the said clerk, in said cause, a demurrer to the 1st and 2nd pleas of defendant, which said demurrer is in the words and figures following, to wit:

In the District Court, Territory of New Mexico, County of Bernalillo.

BROWNE & MANZANARES
vs.
FRANCISCO CHAVEZ, SECOND. } *Scire Facias* to Revive Judgement.

Now comes Francisco A. Manzanares, surviving partner of the partnership under the name and style of Browne & Manzanares, composed of said Francisco A. Manzanares and Lawrence P. Browne, deceased, and says: That he ought not to be barred from
11 having and maintaining his aforesaid proceeding to revive said judgment rendered in the lifetime of said Lawrence P. Browne, in favor of said firm of Browne & Manzanares, composed as aforesaid of said Lawrence P. Browne, now deceased, and said Francisco A. Manzanares, by reason of anything alleged by the said defendant Francisco Chavez, Second, in his first and second pleas filed to said writ, and that he, the said plaintiff, ought not to be compelled in law to answer said pleas, but demurs to same, and for cause of demurrer, alleges the following, to wit:

1st. The said judgment which is sought to be revived was rendered in the lifetime of the said Lawrence P. Browne in favor of the firm of Browne & Manzanares, composed as aforesaid, and he, the said Francisco A. Manzanares, as surviving partner has a right to maintain said proceeding, and to have the said judgment revived.

2nd. Because the said judgment was rendered in favor of the firm of Browne & Manzanares and not in favor of said Lawrence P. Browne individually.

3rd. The said plea filed by said defendant is not good in law because said judgment is not barred within seven years from the date of the rendition thereof.

4th. Because this proceeding is not an original suit, but is part of the original suit which was brought, and in which said judgment was rendered.

Wherefore plaintiff prays judgment of the court, whether he should be required to answer said pleas.

E. W. DOBSON,
Attorney for Plaintiff.

12 And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, at the court-house in said county, at the October, 1895, term and on the thirty-third day of said term, the same being the 27th day of November, 1895, there was entered of record, among other proceedings, the following, to wit:

Present: The Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district thereof.

L. P. BROWNE ET AL.
vs.
FRANCISCO CHAVEZ, 2ND. } No. 4349. *Scire Facias.*

This cause having been heretofore heard by the court upon the plaintiffs' demurrer to the defendant's plea herein and taken under advisement by the court, the court being now sufficiently advised—

It is ordered and adjudged that the said demurrer be and the same is hereby overruled.

And there-, on to wit, the 5th day of December, A. D. 1895, there was filed in the office of the said clerk in said cause, a motion to set aside order overruling demurrer and for a rehearing, which said motion is in the words and figures following, to wit:

In the District Court, County of Bernalillo, Territory of New Mexico.

BROWNE & MANZANARES
vs.
FRANCISCO CHAVEZ, SECOND.

Now comes Francisco A. Manzanares, surviving partner of the firm of Browne & Manzanares and prays the court to set aside
13 the order heretofore overruling the demurrer of the said plaintiffs to the pleas filed by said defendant to the writ of *scire facias* issued in this cause, for the purpose of permitting the plaintiff to re-argue said demurrer. The questions arising upon said demurrer were not fully argued, before the court, and said plaintiff desires to submit additional authorities upon the proposition.

E. W. DOBSON,
Plaintiff's Attorney.

And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, at the court-house of said county at the October, A. D. 1895, term and on the thirty-ninth day of said term, the same being the 5th day of December, 1895, there was made and entered of record, among other proceedings, the following, to wit:

Present: The Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the district court of the second judicial district thereof.

BROWNE & MANZANARES
vs.
FRANCISCO CHAVEZ, 2ND. } No. 4349. *Scire Facias.*

Upon hearing the motion of the plaintiff in this cause to set aside the order sustaining defendant's demurrer—

It is ordered by the court that said motion be sustained and that the said demurrer be set down for re-argument on the 10th day of January, A. D. 1895.

14 And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, at the court-house of said county at the October, 1896, term, and on the twenty-first day of said term, the same being the 28th day of October, 1896, there was had and entered of record, among other proceedings, the following, to wit:

Present: The Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the district court of the second judicial district court thereof.

L. P. BROWNE ET AL.
vs.
FRANCISCO CHAVEZ, 2ND. } No. 4349. *Scire Facias.*

This cause having been set down for argument by the court upon the demurrer of the said plaintiffs to the second plea of the said defendant, comes now the said defendant by his attorney, B. S. Rodey, Esq., and the said plaintiffs come not, the court being fully advised.

It is considered and adjudged by the court that the said demurrer be and it is hereby overruled.

And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, at the court-house of said county at the March, 1897, term, and on the thirtieth day of said term, the same being the 5th day of April, A. D. 1897, the following proceedings, among others, were had and entered of record, to wit:

Present: The Honorable Needham C. Collier, associate jus-
15 tice of the supreme court of the Territory of New Mexico and judge of the district court of the second judicial district thereof.

BROWNE & MANZANARES CO.
vs.
FRANCISCO CHAVEZ, 2ND. } No. 4349. *Scire Facias.*

The demurrer of the said plaintiffs to the second plea of the said defendant having been overruled by the court, come now the said plaintiffs by their attorneys and refuse to plead further, but stand on the said demurrer.

It is therefore considered and adjudged by the court that the said writ be, and it is hereby, dismissed, and that the defendant go hence without day and that the plaintiffs pay the costs herein to be taxed and that execution issue therefor.

TERRITORY OF NEW MEXICO, } ss:
Second Judicial District Court, County of Bernalillo, }

I, O. N. Marron, clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, do hereby certify that the above and foregoing is a true, correct and complete transcript and copy of the record and proceedings had in said cause relative to the writ of *scire facias* issued out of said cause by the appellant, including said writ and all subsequent proceedings therein.

[COURT SEAL.] In witness whereof, I have hereunto set my hand and affixed the seal of the said court, this 12th day of July, A. D. 1897.

O. N. MARRON, *Clerk.*

16 And afterwards, to wit, on the 26th day of May, A. D. 1897, there was filed in the office of the clerk of the supreme court an assignment of errors; which said assignment of errors is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, 1897.

BROWNE, MANZANARES & CO., Plaintiffs in Error, }
vs.
FRANCISCO CHAVES, 2ND, Defendant in Error. }

Assignment of Errors.

Now comes the plaintiff in error and assigns as error, committed by the court in the trial of said cause by the court below, the following, to wit:

First. The court committed error in overruling plaintiffs in error's demurrer to the two pleas filed by defendant in error to the writ of *scire facias* sued out in said cause.

CHILDERS & DOBSON,
Attorneys for Plaintiffs in Error.

Which said assignment was endorsed on the back thereof as follows, to wit:

No. 718. Supreme court, July term, 1897. Browne, Manzanares & Co. *vs.* Francisco Chavez, 2nd. Assignment of errors by plaintiffs in error. Filed in my office this 26th day of May, A. D. 1897. Geo. L. Wyllys, clerk. Childers & Dobson, attorneys.

17 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé on the last Monday of July, A. D. 1897, the same being

July 26th, 1899, on the thirteenth day thereof, the same being the 9th day of August, A. *A.* 1897, the following, among other, proceedings were had as follows, to wit:

L. P. BROWNE and F. A. MANZANARES, Partners under the Firm Name and Style of Browne and Manzanares, Plaintiffs in Error,
vs.
FRANCISCO CHAVES, 2ND, Defendant in Error.

No. 718. Error to District Court of Bernalillo County.

This cause coming on to be heard upon the transcript of record, assignment of errors, and brief of counsel, and after hearing argument by counsel for the repective parties, *and* the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit, on the thirty-sixth day of said regular term, the same being the 11th day of January, A. D. 1898, the following, among other, proceedings were had as follows, t*i* wit:

L. P. BROWNE and F. A. MANZANARES, Partners under the Firm Name and Style of Browne & Manzanares, Plaintiffs in Error,
vs.
FRANCISCO CHAVES, 2ND, Defendant in Error.

No. 718. Error to District Court of Bernalillo County.

It is ordered by the court that this cause be, and the same is hereby, continued until the next regular term of this court.

18 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé on the last Monday of July, the same being the 25th day of July, A. D. 1898, on the fifth day thereof, the following, among other, proceedings were had, as follows, to wit:

BROWNE, MANZANARES & Co., Plaintiffs in Error,
vs.
FRANCISCO CHAVES, 2ND, Defendant in Error.

No. 718. Error to District Court of Bernalillo County.

This cause having come — to be heard upon transcript of record, assignment of errors, and briefs of counsel on file, the same was argued by B. S. Rodey for the defendant in error.

And afterwards, to wit, on the sixth day of said regular*d* term, the same being the 1st day of August, A. D. 1898, the following, among other, proceedings were had, as follows, to wit:

BROWNE, MANZANARES & CO., Plaintiffs in Error, *vs.* FRANCISCO CHAVEZ, 2ND, Defendant in Error.	No. 718. Error to District Court of Bernalillo County.

This cause, again coming on to be heard upon transcript of record, assignment of error, and briefs of counsel, was argued by William B. Childers for plaintiffs in error and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit, on the seventeenth day of said regular term, the same being the 16th day of August, A. D. 1898, the following, among other, proceedings were had, as follows, to wit:

19

BROWNE, MANZANARES & Co., Plaintiffs in Error, *vs.* FRANCISCO CHAVES, 2ND, Defendant in Error.	No. 718. Error to District Court of Bernalillo County.

This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice John R. McFie, Chief Justice William J. Mills and Associate Justices Frank W. Parker, J. W. Crumpacker, and Charles A. Leland concur-ing, affirming the judgment of the court below for reasons states in the opinion of the court on file. It is therefore considered and adjudged by the court that the judgment of the district court in and for the county of Bernalillo, whence this cause came into this court, be, and the same hereby is, affirmed, and that in accordance therewith it is considered and adjudged by the court that the said writ be, and it is hereby, dismissed, and that the defendant in error go hence without day, and that the plaintiff pay the costs herein, to be taxed, and the costs in this court and those in the court below, for which let execution issue.

And afterwards, to wit, on the 16th day of August, A. D. 1898, there was filed in the office of the clerk of the supreme court the opinion of the court; which said opinion is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, 1898.

BROWNE & MANZANARES CO., Plaintiffs in Error,
vs.
FRANCISCO CHAVES, 2ND, Defendant in Error.

No. 718. Error to District Court of Bernalillo County.

20

Syllabus.

A judgment barred by the statute of limitations of seven years, sec. 1861, Comp. Laws 1897, cannot be revived by *scire facias*.

Scire facias to revive a judgment is an action within the meaning of sec. 1861, Comp. Laws of 1897.

The bar of the statute of limitation may be preaded against an action of *scire facias* to revive a judgment unrevived and more than seven years old, and the overruling of a demurrer to such plea is not error.

Statement.

On the 7th day of October, 1885, the firm of Browne and Manzanares Co. recovered a judgment against Francisco Chaves, Jr., for the sum of $4,170.00 and costs in the district court of Bernalillo county.

On the 30th day of September, 1895, and nearly ten years after said judgment was rendered, a precipe was filed with the district clerk for a writ of *scire facias* to revive the judgment and for execution. The writ was issued and served by the sheriff on September 30th, and was returnable October 5th.

On October 5th the defendant filed written appearance, and on October 5th filed two pleas, the first suggesting the death of Browne, one member of the firm, since the rendition of the judgment, and the second, a plea of the statute of limitations of seven years, in bar of the action.

The plaintiffs below demurred to the pleas, but the demurrer was overruled.

Afterwards a motion was filed by plaintiffs below to reopen the case for re-argument of the demurrer; which motion was sustained by the court, and the cause was set down for re-argument January 10th as to the second plea only. The first plea appears to have been abandoned, as also the demurrer thereto.

21 The court again overruled the demurrer to second plea, and, the plaintiffs declining to plead further, the writ of *scire facias* was dismissed.

Opinion of the Court.

McFIE, *J.*:

From the above statement of facts, it is apparent that the sole question for this court to determine is whether or not the court below erred in overruling the demurrer to the defendant's plea of the statute of limitations.

If the statute of limitations of the Territory runs against a proceeding by *scire facias* to revive a judgment, the demurrer to such plea was properly overruled and there was no error.

If the statute does not run against such action, the plea, of course, was an improper one, and it was error to overrule the demurrer thereto.

In determining this matter it is important to observe the difference between a dormant and a barred judgment.

A dormant judgment is one that has become inoperative as to its execution, but a barred judgment is one that is dead and cannot be enforced or revived over the objection of the judgment debtor.

At common law the life of a judment was twenty years, but if an execution was not issued thereon within a year and a day, the judgment became dormant and an alias execution could not issue thereon unless revived by *scire facias*.

The judgment, therefor-, although it had become dormant, was not dead, as its life was twenty years. If the first execution was issued within a year and a day, it did not then become dormant; on the contrary, executions might issue for its enforcement during its life of twenty years, unless it became dormant for some other reason—such, for instance, as death of the parties to it, or assignment, &c., when it might issue for its enforcement, notwithstanding its changed condition.

Freemen on Executions, sec. 31, says:

22 "Before any judgment is either satisfied or barred by lapse of time it may become temporarily inoperative, so far as the right to issue execution is concerned, and so continue until something is done by which such is revived. In this condition it is usually called a dormant judgment."

The writ of *scire facias* was adopted at common law as the proper means of restoring vitality to a dormant judgment before it was satisfied or barred by limitation.

Bingham on Judgments and Executions, 123 and 124, thus defines the writ of *scire facias*: "It is a writ issued out of a court wherein judgment has been entered or to which a record has been removed, reciting such judgment, suggesting the grounds requisite to entitle plaintiff to execution, and requiring the defendant to make known the reason, if any there be, which such execution should not issue.

It is clear that at common law the proceeding by *scire facias* was not a new or distinct action, but simply a writ or process in the original suit for the sole purpose of securing the right to issue execution upon a dormant judgment prior to the expiration of its legal life, and it was not intended nor used for the purpose of reviving a judgment whose life had expired and became barred by a statute of limitation.

In the early case of Roos *vs.* Duval *et al.*, 13th Peters, p. 45, the court was considering a case from Virginia. In that State the law provided that a judgment might be revived upon a motion in the nature of *scire facias*. The statute of limitation as to judgments was ten years. Duval *et al.* had recovered a judgment against Roos, and

when the judgment was about 15 years old a motion was made for an execution to issue, and the motion being sustained, on appeal it was urged that the execution was illegally issued, because the statute of limitation of ten years had barred the judgment and all process upon it.

In construing that statute and its effect in that case the court said: "It is enough to know that the act of 1792 (Virginia) imposes a limitation to actions and executions on judgments by which, like all other limitation laws of the States, a judgment becomes in-
23 operative. An action of debt will not lie upon it, nor can it be revived by *scire facias*, much less can an execution be issued upon it. Its vitality is gone beyond the reach of legal renovation."

This case did not arise under the common law, it is true, but under a statute. We refer to it, however, as showing the construction of a statute of limitation, and that its effect is to destroy the vitality of such judgment beyond the power of revival by *scire facias* or any other process.

Many other cases might be cited to the same effect, but it is unnecessary.

The distinction between a dormant and a barred judgment is very clear, and with this in mind it is not difficult to understand the apparent conflict of authority found in the briefs of the respective counsel in this case.

The case of Smith *vs.* Stevens, N. E. Rep., 594, is cited by plaintiffs in error to sustain their contention, wherein the court held that "although the statute of Illinois provided that the lien of a judgment should continue for only seven years, and that the judgment at that time should become *functus officio* so as to affect the lands therein described, that nevertheless it might be revived by *scire facias*," &c.

In that case the Illinois statute provided that the life of a judgment should be twenty years, but that it ceased to be a lien on real estate in seven years. In other words, it became dormant as to the lien on real estate in seven years, but could be revived by *scire facias* as to the lien during the remaining thirteen years of its life. It was a dormant, not a barred, judgment.

The case of Murch *vs.* Moore, 2nd Oregon, 189, is not in point, because the court holds in that case that a judgment is never barred under the laws of Oregon and may be executed until payment.

The common law, however, has been modified or set aside by statutory enactment in almost all the States and Territories in regard to judgments and the limitation of action thereon.
24 While the right of action in debt and *scire facias* on judgments remain, other provisions are charged, and the authorities cited are not necessarily in conflict when the statutes upon which the decisions were rendered and the circumstances of each case are examined.

The proceeding to revive a dormant judgment in many of the States is by simple motion in the original cause, and execution is awarded by an order in the original case.

In such cases it is usually held that the order to revive does not

more than reinvest the plaintiff with the right to have execution on his original judgment.

Marx *vs.* Sanders, 11 So. Rep., 764.

In that case the action of debt was held barred by the six years' statute of limitation, although the judgment had been once revived within its life

In other State- statutes provide or are construed to mean the *scire facias* is an "action" within the meaning of the statute.

In Greenway *vs.* Dare, 6 N. J. Law, 306—

It was contended by counsel that the proceeding by *scire facias* was not an action or new proceeding, but a continuance of the original suit; but the court held that "every *scire facias* is a new and independent action, referring to the former proceedings, but wholly distinct from them."

In Howard *vs.* Randall, 5th Atlantic Rep., 403—

The court says: "Whatever, strictly speaking, may be the nature of *scire facias* on a judgment at common law, under our statute it is an action or suit within section 2130, R. L."

The plaintiff in error contends that a *scire facias* proceeding is not an action within the meaning of the laws of New Mexico, sec. 1861, Comp. Laws 1897; sec. 2, chap. 53, Laws of 1891, and therefore is not barred by that section, while defendant in error insists that it is an action within the meaning of that section.

Section 1860, C. L. 1884, is as follows: "The following suits or actions, may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided."

Sec. 1861 prior to amendment by laws of 1891 was as follows: "Actions upon a judgment of any court of record of any State or Territory of the United States, or Federal courts of the United States, within fifteen years."

By these sections *of* limitation of fifteen years attached to foreign judgments, and, if that section did not also include local judgments, common law of limitation of twenty years applied to them until section 1861 was amended by sec. 2, chap. 53, Laws of 1891, to read as follows:

SEC. 2 (1891). "Actions founded upon a judgment of any court of the Territory of New Mexico may be brought within seven years from and after the rendition of such judgment, and not afterwards, and actions founded upon any judgment of any court of record of any other Territory or State of the United States, or of the Federal courts may be brought within seven years from and after the rendition of such judgment, and not afterwards; provided, that *ca*tions may be brought upon any existing judgments which, but for this proviso, would be barred within one year from and after the passage of this act, and not afterwards; and all actions upon such judgments not commenced within the time limited by this act, shall be forever barred."

This section, as amended, applies to local judgments as well as foreign and Federal, and fixes a positive limitation of right of action

thereon at seven years, and specifically says "and not afterwards." It is not denied that this limitation would bar an action of debt on a judgment, but it is insisted that the words "actions founded on any judgment" *is* used in a limited sense, and do not include proceedings by *scire facias* to revive a judgment.

We cannot so construe this language, as it was evidently used in its comprehensive sense and was intended to apply to all suits or actions which could properly be brought on a judgment. "Actions founded upon any judgment" are very comprehensive words,
26 the word actions being in the plural, and the language is equivalent to saying all actions the basis of which is a judgment.

To construe this language as plaintiff in error contends would be to hold that an action of debt on a judgment could not be brought because it was barred by the statute in seven years, nor could any other suit be brought, but by *scire facias* the barred judgment may be revived and an execution issued upon it.

Such a construction is absurd and could not have been the intention of the legislature enacting the amendment.

The words "shall be forever barred," in the last line of the section, referring to stale judgments, emphasize the view that this section was intended to bar forever and render invalid all judgments more than seven years old unless the proper steps had been taken to revive them.

This section was carefully drawn, as is shown by the proviso giving one year's time in which to revive stale judgments, referred to in the proviso.

In 1887 the legislature enlarged the time for issuing execution on judgments to five years. Sec. 2, chap. 61, Laws of 1887, reads as follows:

"SEC. 2. An execution may issue at any time on behalf of any one interested in such judgment, referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing any action to revive the same."

It will be observed that the word "action" in that section is used in a liberal sense and refers directly to the proceedings to revive judgments.

The proceedings in this case show all the characteristics of an action at law. The record shows that a precipe was issued for the writ, and the writ of *scire facias* was issued, which is declared to be the equivalent of a declaration. The writ was returnable, as other writs are: the defendant was ordered to show cause; pleas and demurrer
27 were filed, as in other cases; a judgment overruling the demurrer and dismissing the cause was entered, and plaintiffs in error have the *scire facias* proceedings, not the original action, in this court seeking a review and reversal, and we see no reason why such proceedings should not be considered an action within the meaning of our statute.

The legislature- of our States having set aside the common-law rule and made *scire facias* a new and independent action, and we are

of opinion that the legislature of this Territory accomplished the same purpose when the law of 1891 was enacted.

When the legislature declared that "Actions founded upon any judgment, unless brought within seven years, would be forever barred," it evidently intended that seven years was a reasonable time in which to revive them, and that after such time they should be beyond the power of legal renovation by any proceeding whatever, and this we hold to be the meaning and intent of section 1861 of the Comp. Laws of 1897.

"Statutes of limitation are now almost universally regarded favorable as statutes of repose, and liberally construed, and the older decisions to the contrary are disapproved."

Am. and Eng. Ency. Law, vol. 13, p. 692.

"Where the law furnishes to a party a simple method of proceeding against an ultimate debtor, and he fails to pursue that, we think such debtor can appeal to the statute of limitation as a protection."

Glenn *vs.* Dorsheimer, 23 Fed. Rep., 695.

"An- he cannot prevent the statute of limitations from running against him by a circuit- legal proceeding."

Glenn *vs.* Priest, ex'r, 28 Fed. Rep., 907.

Neither plaintiff nor defendant will be allowed to thwart the beneficial and healthful effect of the statute of repose by any mere strategy of legal proceeding.

Am. & Eng. Ency. Law, vol. 13, p. 691.

"It would be a mere strategy of legal proceeding to hold that a judgment could be revived by a *scire facias*, although other actions thereon were barred, and we therefore hold that section 1861,
28 Comp. Laws 1897, applies to proceedings by *scire facias* to revive judgments in this Territory.

The judgment in this case was nearly ten years old at the time this action was brought, and no execution has ever issued upon it, so far as the record shows.

The bar of the statute was properly pleaded against it, and the demurrer was properly overruled.

The overruling of the demurrer to the plea of the statute of limitation and the dismissal of the cause being the only errors assigned, the judgment of the lower court is affirmed with costs.

JOHN R. McFIE.
Associate Justice.

We concur.

WILLIAM J. MILLS, *C. J.*
J. W. CRUMPACKER, *A. J.*
FRANK W. PARKER, *A. J.*
CHARLES A. LELAND, *A. J.*

August 16th, 1898.

28½ TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

Supreme Court.

I, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing twenty-eight pages *is* a full and true and perfect copy of the record and proceedings, pleadings, and opinion filed in the above-entitled cause, which is transmitted to the Supreme Court of the United States in accordance with the writ of error hereto attached.

Witness my hand and the seal of the supreme court of the Territory of New Mexico, this 25th day of September, A. D. 1899.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

29 In the Supreme Court of the United States of America, October Term, A. D. 1899.

BROWN, MANZANARES & COMPANY, Plaintiff in Error, }
vs. } Stipulation.
FRANCISCO CHAVEZ, SECOND, Defendant in Error. }

It is hereby stipulated and agreed by the attorney for the defendant in error, Francisco Chavez, Second, that the issuance and service of citation in this case shall be hereby waived, and the said defendant hereby enters his appearance to said writ of error in the Supreme Court of the United States.

Dec. 6th, 1899.

B. S. RODEY,
Att'y for Def't in Supreme Court of New Mexico.

29½ [Endorsed:] In the Supreme Court of the U. S. Browne, Manzanares Co., plaintiffs in error, *vs.* Francisco Chavez, 2nd, def. in error. Frank Springer and A. A. Jones, East Las Vegas, N. M., attorneys for plaintiff in error.

30 Be it remembered that at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government, on the first Wednesday after the first Monday in January, the same being Wednesday, the 3rd day of January, A. D. 1900, on the twenty-sixth day of said term, the same being the 1st day of February, A. D. 1900, the following, among other, proceedings were had as follows, to wit:

BROWNE & MANZANARES CO., Plaintiff in Error, *vs.* FRANCISCO CHAVEZ (2ND), Defendant in Error.	No. 718.	Error to District Court, Valencia Co.

This cause coming on before the court upon the motion of the plaintiffs in error to be allowed an appeal to the Supreme Court of

the United States, and the court being sufficiently advised in the premises, allows the same. It is therefore considered and adjudged by the court that the said plaintiffs in error are hereby allowed an appeal to the United States Supreme Court in the above-entitled cause.

UNITED STATES OF AMERICA, } ss:
Territory of New Mexico, }

I, the undersigned, Jose D. Sena, clerk of the supreme court of said Territory of New Mexico, hereby certify that the foregoing is a true copy of an order of said court made and entered of record on the first day of February, A. D. 1900, in a certain cause in said court, wherein Browne & Manzanares Company was plaintiff in error and Francisco Chaves, 2nd, was defendant in error; and I do further certify that said cause is the same cause which was removed from this court into the Supreme Court of the United States by writ of error, which was sued out and bears date on the 25th day of
31 September, A. D. 1899, and that the record heretofore certified and returned by me to the Supreme Court of the United States in obedience to the command of said writ of error, together with the foregoing order, constitutes a complete record of said cause.

In witness whereof I have hereunto set my hand and the seal of said supreme court of the Territory of New Mexico this 3rd day of March, A. D. 1900.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

32 The United States of America to Francisco Chavez, 2nd, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal allowed in the supreme court of the Territory of New Mexico, at the January term, A. D. 1900, on the twenty-sixth day thereof, the same being the first day of February, A. D. 1900, wherein Brown & Manzanares Co. were plaintiffs in error and Francisco Chaves, 2nd, was defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error, as — the said appeal mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 7th day of February, A. D. 1900.

WILLIAM. J. MILLS,
Chief Justice, etc.

I, the undersigned, attorney of record in the supreme court of the Territory of New Mexico for the appellee in the above-entitled cause,

hereby waive further service of citation in the above-entitled cause and acknowledge service thereof, provided said appeal is taken in time.

B. S. RODEY,
Attorney for Appellee in the Supreme Court of New Mexico.

Albuquerque, N. M., Feb. 19th, 1900.

Endorsed on cover: File No., 17,583. New Mexico Territory supreme court. Term No., 165. Browne, Manzanares & Company, plaintiff in error, *vs.* Francisco Chavez, 2nd. Filed December 11, 1899. And File No., 17,711. Term No., 247. Browne & Manzanares Company, appellant, *vs.* Francisco Chavez, 2nd. Filed April 10, 1900.